



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**[Docket No. FHWA-2016-0019]**

**Renewal Package from the State of California to the Surface Transportation Project Delivery Program and Proposed Memorandum of Understanding (MOU) Assigning Environmental Responsibilities to the State**

**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (USDOT).

**ACTION:** Notice of proposed MOU and request for comments.

**SUMMARY:** This notice announces that FHWA has received and reviewed a renewal package from the California Department of Transportation (Caltrans) requesting renewed participation in the Surface Transportation Project Delivery Program (Program). This Program allows for FHWA to assign, and States to assume, responsibilities under the National Environmental Policy Act (NEPA), and all or part of FHWA's responsibilities for environmental review, consultation, or other actions required under any Federal environmental law with respect to one or more Federal highway projects within the State. The FHWA has determined the renewal package to be complete, and developed a draft renewal MOU with Caltrans outlining how the State will implement the program with FHWA oversight. The public is invited to comment on Caltrans' request, including its renewal package and the proposed renewal MOU, which includes the proposed assignments and assumptions of environmental review, consultation and other activities.

**DATES:** Please submit comments by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- Facsimile (Fax): 1-202-493-2251.
- Mail: Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Ave., SE., West Building Ground Floor Room W12-140, Washington, DC 20590-0001.
- Hand Delivery: West Building Ground Floor, Room W12-140, 1200 New Jersey Ave. SE, Washington, DC 20590 between 9:00 a.m. and 5:00 p.m. e.t., Monday through Friday, except Federal holidays.

Instructions: You must include the agency name and docket number at the beginning of your comments. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** For the FHWA: Shawn Oliver by e-mail at: [shawn.oliver@dot.gov](mailto:shawn.oliver@dot.gov) or by telephone at (916) 498-5048. The FHWA California Division Office's normal business hours are 8 a.m. to 4:30 p.m. (Pacific Time), Monday-Friday, except for Federal holidays. For the State of California: Tammy Massengale by e-mail at [tammy.massengale@dot.ca.gov](mailto:tammy.massengale@dot.ca.gov) or by telephone at (916) 653-

5157. State business hours are the same as above although State holidays may not completely coincide with Federal holidays.

## **SUPPLEMENTARY INFORMATION:**

### **Electronic Access**

An electronic copy of this notice may be downloaded from the Federal Register's home page at <http://www.archives.gov>. An electronic version of the application materials and proposed MOU may be downloaded by accessing the DOT DMS docket, as described above, at <http://www.regulations.gov/>.

### **Background**

Section 327 of title 23, United States Code (23 U.S.C. 327), allows the Secretary of the DOT (Secretary) to assign, and a State to assume, the responsibilities under the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and all or part of the responsibilities for environmental review, consultation, or other actions required under certain Federal environmental laws with respect to one or more Federal-aid highway projects within the State. The FHWA is authorized to act on behalf of the Secretary with respect to these matters.

Caltrans entered the Surface Transportation Project Delivery Pilot Program on July 1, 2007, after submitting its application to FHWA, obtaining FHWA's approval, and entering into a Memorandum of Understanding (MOU) in accordance with Section 6005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109-59, 119 Stat. 1898) (23 U.S.C. 327) and FHWA's application regulations for the pilot program (the original 23 CFR part 773). On July 6, 2012,

President Obama signed into law the Moving Ahead for Progress in the 21st Century Act (MAP-21) (Pub. L. 112-141, 126 Stat. 545-547). Section 1313 of MAP-21 made the Program permanent, required that the MOU between FHWA and a State have a term of not more than 5 years, and allowed FHWA to renew a States' participation in the Program. The MAP-21 also required the Secretary to amend, as appropriate, the Program's application regulations to account for the amendments to the Program. On September 25, 2012, FHWA and Caltrans entered into a MOU allowing Caltrans to continue to participate in the Program under the terms of the existing MOU until 18 months from the effective date of the final Program application regulations. This timeframe would allow enough time for the U.S. Department of Transportation to develop the process for renewing a State's participation and for Caltrans to follow any steps required by the new regulations. The final rule establishing the revised Program application and the renewal process (the amended 23 CFR part 773) became effective on October 16, 2014, making April 16, 2016, the expiration date for Caltrans' participation under the existing MOU.

On June 22, 2015, after coordination with FHWA, Caltrans submitted the renewal package in accordance with the renewal regulations in 23 CFR 773.115. On December 4, 2015, President Obama signed into law the Fixing America's Surface Transportation Act (FAST Act) (Pub. L. 114-94, 129 Stat. 1390-1392) making further amendments to the Program. On April 1, 2016, FHWA extended the terms of the NEPA Assignment MOU from the expiration date of April 16, 2016, to December 31, 2016, to allow additional

time for the negotiation of the terms of the renewal MOU to be consistent with the changes in the FAST Act. This extension was authorized under 23 CFR 773.115(h).

Under the proposed renewal MOU, FHWA would assign to the State, through Caltrans, the responsibility for making decisions on the following types of highway projects:

1. All Class I, or environmental impact statement (EIS) projects, both on the State highway system (SHS) and local government projects off the SHS that are funded by FHWA or require FHWA approvals. This assignment does not include the environmental review associated with the development and approval of the Draft EIS, Final EIS, and ROD for the following project: District 1: Eureka/Arcata Corridor Improvement.

2. All Class II, or categorically excluded (CE), projects, both on the SHS and local government projects off the SHS that are funded by FHWA or require FHWA approvals, and that do not qualify for assignment of responsibilities pursuant to the MOU for environmental reviews and decisions for actions qualifying for CEs pursuant to the 23 U.S.C. 326 program.

3. All Class III, or environmental assessment (EA) projects, both on the SHS and local government projects off the SHS that are funded by FHWA or require FHWA approvals with the exception of the following projects: District 5: Highway 1 Congestion Management–Santa Cruz HOV Lanes and District 9: Inyo–395 Olancho to Cartago 4 Lane.

4. Projects funded by other Federal agencies [or projects without any Federal funding] of any Class that also include funding by FHWA or require FHWA approvals. For these projects, Caltrans would not assume the NEPA responsibilities of other Federal agencies.

Excluded from assignment are highway projects authorized under 23 U.S.C. 202 and 203, highway projects under 23 U.S.C. 204 unless the project will be designed and constructed by Caltrans, projects that cross State boundaries, and projects that cross or are adjacent to international boundaries.

The assignment also would give Caltrans the responsibility to conduct the following environmental review, consultation, and other related activities:

#### Air Quality

- Clean Air Act (CAA), 42 U.S.C. 7401–7671q, with the exception of any project level conformity determinations.

#### Noise

- Noise Control Act of 1972, 42 U.S.C. 4901-4918
- Compliance with the noise regulations in 23 CFR 772

#### Wildlife

- Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1531–1544
- Marine Mammal Protection Act, 16 U.S.C. 1361-1423h
- Anadromous Fish Conservation Act, 16 U.S.C. 757a–757f
- Fish and Wildlife Coordination Act, 16 U.S.C. 661–667d
- Migratory Bird Treaty Act, 16 U.S.C. 703–712

- Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801-1891d et seq., with Essential Fish Habitat requirements at 1855(b)(2)

#### Hazardous Materials Management

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. 9601 – 9675
- Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C. 9671 - 9675
- Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 – 6992k

#### Historic and Cultural Resources

- Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. 306101 et seq.
- 23 U.S.C. 138 and Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303 and implementing regulations at 23 CFR Part 774
- Archeological Resources Protection Act of 1979, 16 U.S.C. 470aa-470mm
- Title 54, Chapter 31—Preservation of Historical and Archeological Data, 54 U.S.C. 312501-312508
- Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001–30131; 18 U.S.C. 1170

#### Social and Economic Impacts

- American Indian Religious Freedom Act, 42 U.S.C. 1996
- Farmland Protection Policy Act (FPPA), 7 U.S.C. 4201–4209

#### Water Resources and Wetlands

- Clean Water Act, 33 U.S.C. 1251–1387  
(Section 404, Section 401, Section 319)
- Coastal Barrier Resources Act, 16 U.S.C. 3501–3510
- Coastal Zone Management Act, 16 U.S.C. 1451–1466
- Safe Drinking Water Act (SDWA), 42 U.S.C. 300f – 300j–26
- Rivers and Harbors Act of 1899, 33 U.S.C. 401–406
- Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287
- Emergency Wetlands Resources Act, 16 U.S.C. 3901 and 3921
- Wetlands Mitigation, 23 U.S.C. 119(g) and 133(b)(14)
- FHWA wetland and natural habitat mitigation regulations, 23 CFR part 777
- Flood Disaster Protection Act, 42 U.S.C. 4001–4130

#### Parklands

- Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303
- Land and Water Conservation Fund (LWCF) Act, 54 U.S.C. 200302 - 200310

#### FHWA-Specific

- Planning and Environmental Linkages, 23 U.S.C. 168, with the exception of those FHWA responsibilities associated with 23 U.S.C. 134 and 135
- Programmatic Mitigation Plans, 23 U.S.C. 169 with the exception of those FHWA responsibilities associated with 23 U.S.C. 134 and 135

#### Executive Orders Relating to Highway Projects

- E.O. 11990, Protection of Wetlands



- E.O. 11988, Floodplain Management (except approving design standards and determinations that a significant encroachment is the only practicable alternative under 23 CFR sections 650.113 and 650.115)
- E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 13112, Invasive Species.

The proposed renewal MOU would allow Caltrans to continue to act in the place of FHWA in carrying out the environmental review-related functions described above, except with respect to government-to-government consultations with federally recognized Indian tribes. The FHWA will retain responsibility for conducting formal government-to-government consultation with federally recognized Indian tribes, which is required under some of the listed laws and executive orders. Caltrans will continue to handle routine consultations with the tribes and understands that a tribe has the right to direct consultation with FHWA upon request. Caltrans also may assist FHWA with formal consultations, with consent of a tribe, but FHWA remains responsible for the consultation. The FHWA and Caltrans have received requests for formal consultations with several tribes regarding the proposed renewal of the MOU and currently are engaged in ongoing consultations. Caltrans also will not assume FHWA's responsibilities for conformity determinations required under Section 176 of the Clean Air Act (42 U.S.C. 7506) or any responsibility under 23 U.S.C. 134 or 135, or under 49 U.S.C. 5303 or 5304.

The MOU content reflects Caltrans' desire to continue its participation in the Program without any changes (that is, no new responsibilities were requested). The

FHWA and Caltrans have agreed to modify some of the provisions in the MOU to: establish the monitoring process required by the permanent Program; accommodate changes specified in Section 1308 of the FAST Act; clarify, the role of the Department of Justice and FHWA in settlements and appeals; and to make the renewed MOU notice and review time frames consistent with other States in this program. The FHWA and Caltrans have also agreed on a process to address a possible temporary lapse in the State's statutory consent to Federal court jurisdiction and waiver of sovereign immunity waiver. If the State does not provide consent to Federal court jurisdiction and waive sovereign immunity by December 31, 2016, this MOU will be suspended and Caltrans will not be able to make any NEPA decisions or implement any of the environmental review responsibilities assigned under the MOU. The FHWA and Caltrans propose a temporary suspension not to exceed 90 days to provide time for the State to address the deficiency. In the event that the State does not take the necessary action and Caltrans does not provide adequate certification within the time period provided, the State's participation in the Program will be terminated.

A copy of the proposed renewal MOU and renewal package may be viewed on the DOT DMS Docket, as described above, or may be obtained by contacting FHWA or the State at the addresses provided above. A copy also may be viewed on Caltrans' Web site at <http://www.dot.ca.gov/hq/env/nepa/>. The FHWA California Division, in consultation with FHWA Headquarters, will consider the comments submitted when making its decision on the proposed MOU revision. Any final renewal MOU approved

by FHWA may include changes based on comments and consultations relating to the proposed renewal MOU and will be made publicly available.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 327; 42 U.S.C. 4331, 4332; 23 CFR 771.117; 40 CFR 1507.3, 1508.4.

Dated: November 9, 2016.

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Gregory G. Nadeau  
Administrator  
Federal Highway Administration

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